

No. 13548.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

STANDARD PAPER BOX CORPORATION and DONALD C.
RUSSELL,

Plaintiff-Appellants,

vs.

CHARLES RUBLE, SR., CHARLES RUBLE, JR., R. T. MILLER,
FRANK W. CLARK, JR., GEORGE P. RICHARDSON and
ASSOCIATED PAPER BOX COMPANY,

Defendant-Appellees.

PLAINTIFF-APPELLANTS' OPENING BRIEF.

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PLAINTIFF-APPELLANTS' OPENING BRIEF.

Introduction.

This is an appeal by Plaintiff-Appellants (hereinafter called Plaintiffs) from an order of dismissal entered by the District Court of the United States, for the Southern District of California, Central Division, based upon the finding that it affirmatively appears that there is no requisite diversity of citizenship between the parties.

I.

Statement of Jurisdiction.

The complaint alleges jurisdiction to be based upon a complete diversity of citizenship of Plaintiffs and Defendants, and that the amount in controversy exceeds the sum of Three Thousand Dollars (\$3,000), exclusive of

interest and costs, and that the action is not collusive for the purpose of conferring jurisdiction upon the Court [R. 7]. Title 28, United States Code, Section 1332, is the statutory provision sustaining jurisdiction.

II.

Statement of the Case.

A. The Facts.

Standard Paper Box Corporation, Plaintiff, alleges in its complaint that it is a citizen of the State of Delaware [R. 3]; that the individual Defendants, officers and directors of the Plaintiff corporation, are citizens of the State of California [R. 5]; and that the corporate Defendant, Associated Paper Box Company, is a citizen of the State of Washington [R. 5].

The Plaintiff corporation seeks by its complaint to recover from all individual Defendants, damages for a civil conspiracy, losses occasioned by negligence, loss of profits, the appointment of a receiver and an attorney to protect and represent Plaintiff Standard Paper Box Corporation, an election of a new board of directors, injunctive relief against all Defendants, and an accounting. The Plaintiff corporation seeks in addition to effect a dissolution of the corporate Defendant, Associated Paper Box Company, as well as declaratory relief. Donald C. Russell, as the only disinterested Director of Standard Paper Box Corporation, joins the Plaintiff corporation in the complaint so that all directors may be before the Court.

Defendants, both individual and corporate, moved, among other things, the Court to dismiss the complaint on the grounds:

“That Plaintiff, Donald C. Russell, is a citizen of the State of California, and the Defendants, Charles

Ruble, Sr., Charles Ruble, Jr., and George P. Richardson, are also citizens of the State of California; that there is no diversity of citizenship between the parties . . .” [R. 23, 24.]

The Court granted this motion and dismissed the action:

“. . . for lack of jurisdiction on the ground of lack of diversity.” [R. 33.]

B. The Issue.

Does it affirmatively appear from the allegations of the complaint that there is the requisite diversity of citizenship of the parties within the meaning of Title 28, United States Code, Section 1332?

III.

Specification of Errors.

The asserted errors of the District Court relied upon by Plaintiffs are as follows:

(1) The District Court erred in failing to find that Standard Paper Box Corporation is an indispensable party Plaintiff, whose citizenship is diverse from all of the named parties Defendant.

(2) The District Court erred in failing to find that Plaintiff Donald C. Russell is a mere formal, or nominal, party.

(3) The District Court erred in failing to find that said Court has jurisdiction of said action, in that it affirmatively appears that there is the requisite diversity of citizenship between the parties within the meaning and requirements of Title 28, United States Code, Section 1332.

(4) The District Court erred in granting the motion of Defendants to dismiss the action and ordering said action dismissed.

IV.

Summary of Argument.

GENERALLY, THERE MUST BE A DIVERSITY OF CITIZENSHIP BETWEEN PARTIES PLAINTIFF AND DEFENDANT.

A. THERE MUST BE A DIVERSITY OF CITIZENSHIP BETWEEN INDISPENSABLE PARTIES.

(1) PLAINTIFF STANDARD PAPER BOX IS AN INDISPENSABLE PARTY.

(2) PLAINTIFF DONALD C. RUSSELL IS NOT AN INDISPENSABLE PARTY.

B. LACK OF DIVERSITY OF CITIZENSHIP OF A FORMAL AND/OR NOMINAL PARTY PLAINTIFF DOES NOT OUST THE COURT OF JURISDICTION.

C. PLAINTIFF DONALD C. RUSSELL IS A NOMINAL AND/OR FORMAL PARTY.

D. THERE BEING COMPLETE DIVERSITY OF CITIZENSHIP BETWEEN THE ONLY INDISPENSABLE PARTY PLAINTIFF, STANDARD PAPER BOX CORPORATION, AND ALL DEFENDANTS, THE COURT SHOULD NOT HAVE CONSIDERED THE CITIZENSHIP OF THE FORMAL AND/OR NOMINAL PARTY PLAINTIFF DONALD C. RUSSELL, AND SHOULD NOT HAVE DISMISSED THIS CAUSE.

V.

ARGUMENT.

**In Order to Sustain the Jurisdiction of the Court
There Must Be a Diversity of Citizenship Between
Parties Plaintiff and Defendant.**

It is clear from the record that the Plaintiff Standard Paper Box Corporation is a citizen of the State of Delaware, that the Plaintiff Donald C. Russell is a citizen of the State of California, that all the Defendant individuals are citizens of the State of California, and that the Defendant Associated Paper Box Company is a citizen of the State of Washington. It seems patent that for purposes of this appeal that the nature or extent of the interest of any of the Defendants in the controversy or its subject matter is not in issue.

**A. There Must Be a Diversity of Citizenship Between
Indispensable Parties.**

The Federal Courts, being of limited jurisdiction, it is, of course, necessary for a plaintiff to affirmatively allege the basis of jurisdiction. The jurisdictional basis in this cause is predicated upon diversity of citizenship as set forth in Title 28, United States Code, Section 1332:

“(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$3,000, exclusive of interest and costs, and is between:

(1) Citizens of different States; . . .”

To sustain jurisdiction upon diversity of citizenship there must be an “actual” and “substantial” controversy

between citizens of different States. These requirements are fundamental. The parties on either side of an actual or substantial controversy are the indispensable parties to a determination thereof. Whether the indispensable parties are Plaintiffs or Defendants is to be ascertained from the primary and controlling matter in dispute and the principal purpose of the suit. The case of *Hann v. City of Clinton*, 131 F. 2d 978, 981 (C. C. A. 9, 1942), states this rule in the following language:

“In determining the question whether diversity of citizenship requisite to jurisdiction exists, a Court looks to the citizenship of the real parties in interest;”

The use of the term “real party in interest” is synonymous with the term “indispensable party,” as evidenced by Rule 17(a) of the Federal Rules of Civil Procedure, which is quoted in part as follows:

“Every action shall be prosecuted in the name of the real party in interest:”

The reason for the mandatory requirement of joinder of indispensable parties is not predicated upon the Federal Jurisdictional Rule with respect to diversity of citizenship, but is rather a requirement of any Court in the application of general, equitable law. In the case of *State of Washington v. United States*, 87 F. 2d 421 (C. C. A. 9, 1936), the Court states this rule in the following language at page 427:

“. . . no Court can adjudicate directly upon a person’s right, without the party being either actually or constructively before the Court.”

Substantially all of the reported cases which concern themselves with the application of the rule as set forth in *Hann v. City of Clinton*, 131 F. 2d 978 (C. C. A. 9, 1942), *supra*, are factually similar in that the question raised is with respect to a party who has not been named in the complaint. The rules as established by these cases are therefore couched in language concerning the requirement of the presence of a party who has an interest in the controversy and who is absent from the cause. It is submitted that the same test applies respecting a factual situation where a party is present in a cause, has an interest therein, and the question is then raised as to whether or not his presence is indispensable.

The leading case of *State of Washington v. United States*, 87 F. 2d 421 (C. C. A. 9, 1936), above cited, has restated the general equitable law, respecting the requirement of joinder of indispensable parties in the form of a test which the Court must make. This test is set forth in the following language at page 427:

“. . . (1) is the interest of the absent party distinct and severable? (2) In the absence of such party, can the Court render justice between the parties before it? (3) Will the decree made, in the absence of such party, have no injurious effect on the interest of such absent party? (4) Will the final determination, in the absence of such party, be consistent with equity and good conscience?

“If, after the court determines that an absent party is interested in the controversy, . . . (and) . . . any one of the four questions is answered in the negative, then the absent party is indispensable.”

(1) Plaintiff Standard Paper Box Corporation Is an
Indispensable Party.

Assuming for the purpose of analogy and argument that the Plaintiff Standard Paper Box Corporation was not named a party to this cause, and applying the test of *State of Washington v. United States, supra*, it is patent that the presence of the Plaintiff Standard Paper Box Corporation is indispensable to the proceeding.

It is obvious that as a plaintiff, Standard Paper Box Corporation has not only a plaintiff's interest in the controversy but the only real and substantial plaintiff's interest in view of the allegations of the complaint which set forth the following facts: That the Plaintiff corporation is under the domination and under the control of a dummy board of directors, is the victim of a civil conspiracy, and is being deprived of the privileges and profits to which it is unquestionably entitled.

Applying the test No. 1: (1) is the interest of the absent party distinct and severable? It is at once apparent that the only and primary interest involved in the controversy of this action is that of the corporate Plaintiff, and in the absence of a representation of such interest the complaint would not state a claim. The answer to test No. 1 is in the negative.

Applying tests Nos. 2 and 4, the answers to each is also in the negative, for in the absence of the corporate Plaintiff the Court could not in justice appoint a receiver or order an election of directors.

Although the aforementioned test requires only a "no" answer on any one of the four questions, it appears that a "no" answer applies to at least three of these questions; it seems reasonable to conclude, therefore, that Stand-

ard Paper Box Corporation is an indispensable party Plaintiff to the cause whose citizenship is diverse from all of the Defendants in this action.

(2) Plaintiff Donald C. Russell Is Not an Indispensable Party.

That Plaintiff Donald C. Russell has an interest in the controversy (as distinguished from an interest in the subject-matter) is doubtful. The Plaintiff Russell, as a director of the Plaintiff corporation, is a mere fiduciary. Assuming for purpose of argument, however, that such relationship constitutes an interest in the controversy within the meaning of the aforementioned rule, the tests must be applied to determine whether or not he is an indispensable party.

Applying test No. 1, it is apparent that the interest of the Plaintiff Russell, were he absent, is distinct and severable from that of the interest of the Plaintiff corporation. He seeks no personal relief in the form of a money judgment or otherwise, but merely a declaration of the rights and duties of the respective parties with respect to the subject matter of the action. The interest of Plaintiff Russell as a corporate director is distinct and severable from the interest of Standard Paper Box, the Plaintiff corporation.

Applying test No. 2, in the absence of Plaintiff Russell, the Court can render complete justice between the parties before it. The Court, in his absence, can determine the obligations and duties of the Defendants with respect to the Plaintiff corporation. A judgment can be rendered in favor of the corporation, an accounting ordered as against the Defendants, a declaration of the rights of the Plaintiff corporation with respect to the

duties of the Defendants, an election can be ordered held with respect to new directors, an attorney can be appointed to represent the corporation, a receiver can be effectively appointed since all other directors are parties Defendant, and in general all things prayed for in the complaint can be granted in his absence.

Applying test No. 3, such a decree made in the absence of Plaintiff Donald C. Russell could have no injurious effect upon his interest in view of the admitted allegations in the complaint. All relief prayed for, including a declaration of the rights of the parties, the appointment of an attorney for the corporation, an election of a new board of directors, as well as an order enjoining the Defendant directors and officers from holding future office when granted, would not be injurious to him.

Applying test No. 4, a final determination in the absence of Plaintiff Donald C. Russell, would be wholly consistent with equity and good conscience.

Were the facts other than in this cause, to the extent only that the action had been brought by a shareholder in the form of a representative suit, it would not have been necessary to join Donald C. Russell as a defendant, for he is a fiduciary who has neither asked for nor received any interest in the transactions complained of and only the defaulting directors and officers would need to be parties. The case of *Woodruff v. Howes*, 88 Cal. 184, recognizes this proposition at page 201:

“ . . . As to the rest, Howes, Bonebrake, and Merrill are the only persons interested in the trans-

actions complained of. The other directors are only their implements and representatives,' and are not shown to have received, or to have any interest in the fruits of said transactions. It was not necessary to join them as defendants."

It therefore seems reasonable to conclude that Plaintiff Donald C. Russell is not an indispensable party to the cause.

B. Lack of Diversity of Citizenship of a Formal and/or Nominal Party Does Not Oust the Court of Jurisdiction.

The established rule in diversity of citizenship cases in Federal Courts is that the joinder, or non-joinder, of nominal and/or formal parties will have no effect upon the jurisdiction of the Court.

The case of *Hann v. City of Clinton*, 131 F. 2d 978 (C. C. A. 9, 1942), states this rule in the following language at page 981:

" . . . and where there is complete diversity between them [real parties in interest], the presence of a nominal party with no real interest in the controversy will be disregarded. *Jurisdiction is not ousted by the joinder or non-joinder of mere formal parties.*" (Emphasis and insert added.)

See:

Wormley v. Wormley, 21 U. S. 421, 5 L. Ed. 651;
Shields v. Barrow, 58 U. S. 130, 15 L. Ed. 158
(1855);

Ex parte Nebraska, 209 U. S. 436, 52 L. Ed. 876,
28 S. Ct. 581 (1908);

Salem Trust Co. v. Manufacturers Finance Co.,
264 U. S. 182, 68 L. Ed. 628, 44 S. Ct. 266
(1924);

People v. Bruce, 129 F. 2d 421 (C. C. A. 9, 1942),
cert. denied, 317 U. S. 678, 87 L. Ed. 544, 63
S. Ct. 157 (1942);

*Blytheville, L. & A. S. R. Co. v. St. Louis San
Francisco Ry. Co.*, 33 F. 2d 481 (C. C. A. 8,
1929).

The Federal Courts in determining whether a given party's interest in the controversy is formal and/or nominal have adhered to the following rule as set forth in the case of *State of Washington v. United States*, 87 F. 2d 421 (C. C. A. 9, 1936), *supra*, where the Court states at page 426:

“. . . Where he [the party in question] is not interested in the controversy between the immediate litigants, but has an interest in the subject matter which may be conveniently settled in the suit, and thereby prevent further litigation, he [the party in question] may be made a party or not, at the option of the complainant.” (Insert ours.)

C. Plaintiff Donald C. Russell Is a Nominal and/or Formal Party.

Applying the aforementioned proposition to the facts of the case, it is apparent that Plaintiff Donald C. Russell is a mere formal and/or nominal party. As a director of the Plaintiff Standard Paper Box Corporation, he is a fiduciary and as such has a duty to the corporation to act in its best interest. In the performance of this duty he has joined with the corporation as a party Plaintiff in this action. He asserts no right or claim which is fundamentally his own in this cause, but merely asserts the existence of a duty which he thusly performs. He has merely the interest of a fiduciary as to the corporate Plaintiff and such is not an interest in the controversy between the corporate Plaintiff and the Defendants. The only interest that he does have, as the only disinterested director, is in the relationship between the corporate Plaintiff and its board of directors which is the subject matter of the suit. Since all other directors of the Plaintiff corporation are named as Defendants in the cause, the presence of the Plaintiff Russell is convenient to the settlement of all questions in relation to the subject matter and thereby prevent further litigation.

The case of *Overman Wheel Company v. Pope Manufacturing Company*, 46 Fed. 577 (C. C. Conn., 1891), is illustrative of the formal party rule. Two entities, one corporate and one individual having different State citizenships joined as parties plaintiff in an action originally filed in the State Court. The defendant petitioned for

removal of the cause to the Federal Court on the ground of diversity of citizenship, which petition was granted. In the Federal Court the plaintiffs moved the Court to remand the action to the State Court for lack of diversity of citizenship between the individual plaintiff and the defendant. The presence of the individual plaintiff was considered by the Court on page 577 as follows:

“. . . Albert H. Overman, the other plaintiff, is a citizen of the state of Massachusetts, but it now sufficiently appears in the record that he is simply an agent or attorney of the other plaintiff, and has no personal interest in the controversy. His presence as a plaintiff is of no importance with respect to the defendant's right of removal.”

The case of *Sioux City & D. M. Ry. Co. v. Chicago M. & St. P. Ry. Co.*, 27 Fed. 770 (C. C. Ia., 1886), is further illustrative of the formal party rule involving the presence in an action of a party having a duty to perform, wherein the Court said:

“The allegations of the bill filed in this case do not show that the sheriff and commissioners have any joint interest in the subject of the controversy with the Chicago, Milwaukee & St. Paul Railway Company; but, on the contrary, it appears from the bill that the only connection they have with the matter in dispute is in discharge of the duty imposed upon them by law, and that does not confer upon them any interest in the controversy; and hence it must be held that they are nominal parties only, and the jurisdiction of this court depends upon the citizenship of the real parties to the controversy, to-wit, the railway companies.”

It seems clear, therefore, that the Plaintiff Donald C. Russell is a mere formal and/or nominal party plaintiff whose citizenship is not to be considered for purposes of determining jurisdiction in the Federal Court, although his citizenship is not diverse from the citizenship of the individual defendants.

D. Conclusion.

It is believed that the record of this case clearly establishes that Plaintiff Standard Paper Box Corporation is an indispensable party to the cause; that Plaintiff Donald C. Russell is a mere nominal and/or formal party to the cause; that the citizenship of Donald C. Russell should not be considered and should be disregarded with respect to the question of the jurisdiction of the Federal Court as predicated upon diversity; and that the order dismissing the cause should be reversed.

Dated: At Beverly Hills, California, this 17th day of December, 1952.

Respectfully submitted,

J. ROBERT MADDOX,
Attorney for Plaintiff-Appellants.

